(1) Supreme Court, U.S.
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CASE NO. OFFICE OF THE CLERK

In The Supreme Court Of The United States

October Term, 1999

Alvin Klein, Robert Lippman & Steven Lippman Dba
Village Expressmart,

Petitioners,

versus

Department of Alcoholic Bevera Control; Alcoholic
Beverage Control Appeals Board,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Alcoholic Beverage Control Appeals Board AB-7184
California Court of Appeal Second Appellate District
Division Seven B134373

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QUESTIONS PRESENTED FOR REVIEW

1. Does Article 3 § 3.5 of the California Constitution preclude a state administrative agency such as the Department of Alcoholic Beverage Control from finding that a state statute requiring the revocation of a license to sell alcoholic beverages violates the United States Constitution? (See LSO, Ltd. v. Stroh, 205 F.3d 1146 (9th Cir. 2000).)

2. Does Article 3 § 3.5 of the California Constitution preclude the Department of Alcoholic Beverage Control from finding that the state statutes governing administrative discovery violate United States constitutional guarantees to due process?

3. Does Article 3 § 3.5 of the California Constitution preclude the Department of Alcoholic Beverage Control from finding that state statutes governing adequacy of finding of fact were unconstitutional as applied herein?

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The caption contains the names of all parties to the proceedings in the California Court of Appeal and California Supreme Court.

OPINIONS AND ORDERS BELOW

Respondent Department of Alcoholic Beverage Control issued its certified decision revoking Petitioner's license for sale of alcoholic beverages in this matter on July 2, 1998. The Alcoholic Beverage Control Appeals Board reversed the decision of the Department on July 19, 1999. On Petition For Writ Of Review, the California Court of Appeal Second Appellate District reversed the decision of the Appeals Board in an unpublished opinion on January 26, 2000. The California Supreme Court denied Petitioner's Petition For Writ Of Review on April 26, 2000.

The Decision of the Appeals Board is attached hereto as Appendix 1. The unpublished opinion of the Court of Appeal is attached hereto as Appendix 2. The order of the California Supreme Court is attached hereto as Appendix 3.

BASIS FOR JURISDICTION IN THIS COURT

The State of California Court of Appeal, Second Appellate District issued an unpublished opinion January 26, 2000. The California Supreme Court issued its order in this matter on April 26, 2000. This Court has jurisdiction to review the final judgment and decree rendered by the California Supreme Court pursuant to 28 USC § 1257.

STATUTORY PROVISIONS INVOLVED

California Business and Professions Code § 25658.1 provides in relevant part:

"(b) Notwithstanding Section 24200, the department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period. This provision shall

not be construed to limit the department's authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty."

Although stated as discretionary, the Department applied the revocation as mandatory in this case.

Business and Professions Code § 23084 states the limits of the Alcoholic Beverage Control Appeals Board:

"The review by the board of a decision of the department shall be limited to the questions:

(a) Whether the department has proceeded without, or in excess of, its jurisdiction.

(b) Whether the department has proceeded in the manner required by law.

(c) Whether the decision is supported by the findings.

(d) Whether the findings are supported by substantial evidence in the light of the whole record.

(e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department."

California Government Code section 11507.5 delineates the discovery rights and procedures for parties in a state administrative process and states: "The provisions of 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter."

California Constitution Article 3 § 3.5 provides:

"An administrative agency, including an administrative agency created by the Constitution or an intiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statue unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

STATEMENT OF THE CASE

In the case that underlies this Petition for Writ of Certiorari, the Department of Alcoholic Beverage Control (the "Department"), revoked a liquor license of one of its licensees for selling alcohol to a minor after a trial before an administrative law judge (hereinafter "ALJ"). The ALJ, in his revocation order, made Determinations of Issues which purported to follow logically from alternative Findings of Fact that are inconsistent with each other. The ALJ heard conflicting testimony of the Department and the license holder, and reviewed the evidence offered by the parties. Not able to reach definitive findings on the evidence sufficient to support his conclusion(s) regarding whether or not the minor offered the clerk false identification, the ALJ glossed over his fact-finding duty, and made what would have been a key finding of fact in the form of two statements that provide absolutely no basis for a decision:

1. The minor possessed and used false identification (a defense to the action under California Business & Professions Code § 25660); and

2. The minor did not possess and did not use false identification.

Based in part on the lack of affirmative Findings of Fact in support the Department's Determination of Issues, Petitioners herein appealed the Department's decision to the Alcoholic Beverage Control Appeals Board, which found in favor of Petitioners, holding that the Department had failed to make findings of fact sufficient to sustain a

revocation of the Petitioners' liquor license. The Alcoholic Beverage Control Appeals Board, in its order reversing the Department's revocation Order, synopsized the irregular findings thusly:

> "It is as if the ALJ is saying I do not know if false identification was shown, but if it was, a reasonable person would not have relied on it."

(Order of the ABC Appeals Board, attached hereto as Appendix 1.)

The Appeals Board further provided that "[the above] is not the sort of finding that will support an order of revocation." Id.

The Department thereafter petitioned the Court of Appeal for review of the Alcoholic Beverage Control Appeals Board Order reversing the Department's decision to revoke Petitioners' liquor license.

The Court of Appeal reversed the Order of the Alcoholic Beverage Control Appeals Board and directed the Board to reinstate the Department's Revocation of Petitioners' liquor license. In its Opinion, the Court discussed the conflicting, alternative findings that were the basis of the Alcoholic Beverage Control Appeals Board's decision, as follows:

> "The Board contends that the judge made no 'definitive finding' that false identification was not shown, but this is a strained reading of the judge's written order. The judge recited in detail the evidence refuting the false identification claim, twice referring to [the salesclerk's] failure to mention false identification on the night of the sale. Read fairly, the judge's order made alternative findings: that no false identification was shown, and that even if it was, [the salesclerk] in the exercise of prudence should have realized from [the minor's] appearance that he was underage." (Emphasis added.)

Note that since no false identification was searched for and therefore not found by the Department, no false identification was brought to the hearing. Since no such identification was in evidence, it would be impossible for the ALJ (and the Court of Appeal) to determine the propriety or impropriety of reliance on such identification.

The Appeals Board reversed based upon the obvious insufficiency of the Findings of Fact. However, the Board never addressed Petitioner's argument that the penalty of revocation was imposed following consideration of unconstitutional invalid "prior violations."

The Board also declined to address the unconstitutional application of discovery procedures.

The Department and the Appeals Board failed and declined, respectively, to address these issues understanding that Article 3, § 3.5 disallowed consideration of constitutional infirmities underlying the statutes in their application in this case.

The U.S. Court of Appeals, Ninth Circuit, discussed Article 3 § 3.5 of the California Constitution in Dash, Inc. v. Alcoholic Beverage Control Appeals Board 683 F.2d 1229 (9th Cir. 1982), holding:

"At issue here is the impact upon the above procedural procesws of the 1967 amendment to the Bus. & Prof. Code embodied in section 23090.5 [FN9] restricting review of Department determinations to petitions for writ of review with the California appellate courts, together with the 1978 amendment to article III, s 3.5 of the California Constitution [FN10} which prohibit administrative bodies from declaring statutes unconstitutional or refusing enforcement of statutes on the basis of claims that such statutes are unconstitutional. Appellants contend that these two enactments, working in combination, deny licensees due process of law by forcing licensees to submit to revocations by an administrative body which may not

act on constitutional defenses, while review of such decisions is limited to a discretionary petition for writ of review before the appellate courts. We disagree." (683 F.2nd at p. 1233-1234.)

The court in Dash continued:

"Appellants' arguments exaggerate the impact of the two sections. Article 3, s 3.5 merely 'places restraints on administrative agencies relative to their refusal to enforce statutes on constitutional grounds; it does not affect their enforcement of their own rules on their competence to examine evidence before them in light of constitutional standards.' Capitol Industries-EMI v. Bennett, --- F.2d ---, at n.28, Nos. 80-4113 and 80-4114, slip op. at 843, n.28 (9th Cir., February 16, 1982) (amended July 22, 1982, slip op. at 3306), cert. denied, --- U.S. ---, 102 S.Ct. 1438, 71 L.Ed.2d 655 (1982) (quoting Goldin v. Public Utilities Commission, 23 Cal.3d 638m 688, 153 Cal.Rptr. 802, n.18, 592 P.2d 289, 309 n.18 (1979)). Moreover, section 3.5 does not affect the powers of the California courts to consider constitutional claims. Id. slip op. at 843, n.27, at---, n.27.

"Despite the 1967 anendment to Cal.Bus. & Prof. Code s 23090.5, the appellate courts retain jurisdiction to determine whether the Department 'has proveeded without or in excess of its jurisdiction,' or 'has proceeded in the manner required by law.' Bus. & Prof.Code ss 23090.2(a) and (b).[FN11] As mentioned, section 3.5 also has not affected these powers. In addition, the appellate courts, by virtue of their inherent powers to declare statutes unconstitutional, Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60 (1803); Byers v. Board of Supervisors, 262 Cal. App. 2d 148, 157-58, 68 Cal. Rptr. 549 (1968), may do so based upon arguments raised in petitions for writs of review of a Departmental determination. Those courts may therefore reach constitutional issues raised by

petitions seeking review of Department determinations." (683 F.2d at page 1234.)

The court in Dash concluded that constitutional issues could be raised at the administrative level and decided at the appellate jurisdictional level. However in this case, because the constitutional issues weren't addressed by the Department and the Appeals Board, the Court of Appeal in reversing the Appeals Board and reinstating the Department's order of revocation never had the opportunity to reach these issues either.

More recently the United States Court of Appeal for the Ninth Circuit revisited Article 3 § 3.5 in LSO, Ltd. v. Stroh, 205 F.3d 1146 (9th Cir. 2000) as follows:

"The remaining question is whether reasonable people in the Officials' position could have believe that their conduct was lawful. The officials argue that, even if it was clear in 1997 that applying Section 143.4 to deny LSO a venue for its exhibition was unconstitutional, they were nonetheless required to enforce the regulation because of Article III, Section 3.5, Subdivision (a), of the California Constitution. This provision states that an administrative agency has no power to 'refuse to enforce a statute[] on the basis of it being unconstitutional, unless an appellate court has made a determination that such statute is unconstitutional.' Cal. Const. art. III, § 3.5(a) Thus, the Officials contend, since no appellate court had yet struck down Section 143.4, they could have reasonably thought they were required to enforce the law.

"This argument, however, takes not account of the Supremacy Clause of the United States Constitution. It is a long-standing principle that a state may not immunize its officials from the requirements of federal law. See Martinez v. California, 444 U.S. 277, 284 (1980). To adopt the Officials' contention would be to eliminate any obligation on the part of state officials to draw even the

most obvious conclusions from well-settled federal case law until the precise state law at issue is struck down. Such a result would be untenable. 'Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 OR § 1985(3) cannot be immunized by state law....[T]he supremacy clause of the Constitution insures that the proper construction may be enforced.' See id. at 284 n.8 (quoting Hampton v. Chicago, 484 F.2d 602, 607 (7th Cir. 1973))."

When the Department failed to address the constitutional questions concerning consideration of invalid "prior violations," and failed to address unconstitutional restrictions of the discovery process, the process fell short of due process as guaranteed by the United States Constitution.

When the California Court of Appeal misconstrued the statutory jurisdictional limits and obligations of the Appeals Board in its decision, Petitioner was left with a process of administrative appellate review that fell short of due process as guaranteed by the United States Constitution.

With respect to the issue of constitutional sufficiency of findings, the Court of Appeal misconstrued the Appeals Board's statutory obligations under Business and Professions Code section 23084 and the Board's proper approach to insufficient and contradictory findings reached by the Department in its decision.

In Laisne v. State Board of Optometry, 19 Cal. 2d 831, 846, 123 P. 2d 457, 466 (1942), the California Supreme Court held as follows:

"It should always be kept in mind that the evil of administrative action which must be guarded against is not the fact-finding power, but the conclusiveness of the fact-finding power coupled with the order based on the findings made which would deprive a person of a property right."

Administrative agencies, therefore, must be kept in check by the state courts, which should rightly oversee their actions and ensure that findings of fact are properly made in order to avoid constitutional violations.

The "alternative" findings made by the Department were erroneously approved by the Court of Appeal (Opinion at 5), because, logically, "alternative" findings either cannot both (or all) be supported by "substantial evidence", or if "alternative" findings are both supported by substantial evidence, such that an ALJ is compelled to give weight to both, these conflicting alternatives cannot both support a logical determination of issues leading to the loss of a vested property right. As the Court of Appeal stated in Lorimore v. State Personnel Bd., 232 Cal. App. 2d 183, 42 Cal. Rptr. 640 (1965):

> "here findings are devoid of evidentiary support, or are based upon inferences arbitrarily drawn and without reasonable foundation ... the administrative order will be reversed as not being supported by substantial evidence in light of the whole record. 232 Cal. App. 2d at 187."

Furthermore, the Court of Appeal itself in Los Alamitos Gen. Hosp. v. Lackner, 86 Cal. App. 3d 417, 425, 149 Cal. Rptr. 98, 104 (1978) noted that where findings were susceptible of two equally possible meanings, that finding is not adequate. Surely "alternative" findings are nothing if not "findings susceptible of two equally possible meanings." Id.

The United States Supreme Court addressed what sort of administrative findings are "constitutionally sufficient to justify the conditions imposed" in Dolan v. City of Tigard, 512 U.S. 364, 389, 129 L. Ed. 2d 304, 114 S. Ct. 2309, 2318 (1994). Specifically, Dolan addressed administrative findings made by a city planning commission when it sought to condition a development permit on the landowners dedication of an easement to effectuate the

community's open-space and bike-lane plan. See 512 U.S. at 378-80. The landowner requested a variance from the easement requirement, arguing that her plan did not require dedication of the sought-after easement because it would not conflict with the city's plan. See id. at 381. The city denied the request for a variance after making "a series of findings concerning the relationship between the dedicated conditions and the projected impacts of petitioner's project." Id. at 381

On appeal to the Land Use Board of Appeals (LUBA), the landowner argued that the easement dedication requirement was unrelated to her proposed development, but LUBA upheld the easement dedication, assuming that the city's findings were supported by substantial evidence. See id. at 382. The landowner appealed again, this time to th.e Oregon Court of Appeals, which affirmed the original administrative decision. See id.

On appeal to the U.S. Supreme Court, the Court noted that "[t]he city made the following specific findings relevant to the pedestrian/bicycle pathway":

> "In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." Id. at 389 (emphasis added).

The Dolan Court reversed the Supreme Court of Oregon and remanded the case for further proceedings. Citing the dissent from the Oregon Supreme Court, the U.S. Supreme Court criticized the purported "findings" by the city in support of the easement it sought, suggesting that the administrative body's "findings" took a short-cut around the constitution in order to satisfy a "strong public desire

to improve the public condition." See id. at 396. Specifically, the Dolan Court provided as follows:

> The findings of fact that the bicycle pathway system 'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand. (Citation.) No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated. Id. at 395.

In like manner, the Department's findings, deemed "alternative" findings by the Court of Appeal, take a short-cut around the state constitution, unfairly depriving the Petitioners of their license to do business without engaging in even a rough mathematical calculation in support of its Determinations of Issues. The Alcoholic Beverage Control Appeals Board noted this discrepancy, and rightly held that the Department's findings could not support a revocation. However, the Court of Appeal held that alternative findings could support a license revocation, and this ignores the U.S. Supreme Court mandate that agencies must make some effort to quantify their findings of in support of their determinations before property interests can be divested by administrative action. 512 U.S. at 395. Such laxity on the part of administrative bodies is likely to unfairly deprive not only Petitioners, but numerous license holders in California, of their ability to make a living.

The Court of Appeal's Second District and the California Supreme Court should be instructed by this Court to follow this Court's mandate concerning findings, for example, the California's First Appellate District in Saad v. City of Berkeley, 24 Cal. App. 4th 1206, 30 Cal.Rptr.2d 95 (1994), discussed at length the circumstances under which

an administrative decision will stand in the face of multiple findings, not all of which are sufficient to support a decision. In Saad, Bay Area property owners sought to build a large house on a hilly lot that was zoned to include strict building regulations. See 24 Cal. App. 4th at 1208. Their building plans consistently generated opposition from neighbors who complained to the city's Board of Adjustment that the plans would impair their solar power generators, block their views, increase the risk of landslides, and add to traffic and drainage problems. See id. at 1209-10. Following multiple hearings on the issue, the city's Board of Adjustment disapproved the Saads' building plan, making the following findings of fact:

1. The extreme slope and other characteristics of the site created necessary and logical limitations on the size of the dwelling unit that can be built there. The structure, as proposed by the applicant, is not compatible with the site for the following reasons:

a. The structure, as proposed, would have a detrimental effect on views from dwellings to the east of the site.

b. The bulk and the massing of the proposed structure on the steep slope would create a towering effect detrimental to the welfare of the residents located down slope of the site.

2. As designed, the project may not adequately mitigate potential fire and earthquake hazards to neighboring residents and properties. Id. at 1209-10.

The Saads appealed to the City Council, which upheld the Board's decision. See id. at 1211. The Saads thereafter filed a petition for writ of administrative mandamus. See id. The court ruled that the Board's first two findings regarding view impairment and the towering effect of the proposed structure were specific, well considered and supported by substantial evidence. See id. However, the

court found also that the third finding that the project "may not adequately mitigate potential fire and earthquake hazards" was inherently ambiguous and not supported by substantial evidence, and therefore remanded the matter back to the city, generating cross-appeals to the Court of Appeal. See id.

In discussing the three findings by the Board of Adjustment, The Saad court noted that the inadequacy of one of three findings would not defeat the Board's ultimate determination to deny the building permit. See id. at 1215. The Saad court provided, in pertinent part, as follows:

> [The] City could simply eliminate the other findings and still prevail upon the one adequate finding of detriment. Unless the findings are so intertwined that a failure of one could reasonably lead the City to reconsider its denial of the permit, the Saads cannot establish prejudice.
>
> * * *
>
> [The] City in this case clearly made three independent findings supporting denial of the permit. A flaw in any one would not undermine the other two. Under the ordinance, if any one of the three findings was sufficient and supported by substantial evidence, denial of the permit was required.

Id. at 1215-16.

The instant matter is unlike Saad, in that the findings by the Department are intertwined. The findings that the minor did and did not present false identification are dependent and undermine each other, and therefore they do not support the revocation order. Such findings are not the sort of "alternative" findings, as in Saad, that can support a revocation, and this Court should so instruct the California Second District Court of Appeal and the California Supreme Court.

The opinion of the Court of Appeal should not have been upheld. The California Supreme Court tacitly approved the practice of administrative agencies making "alternative" or either/or findings in support of their determinations. Such fact-finding belies the apparent truth of the original administrative decision; that is, that the "findings of fact" followed the determination of issues, and were crafted to support the determination. This is an improper calculation – the findings of fact must come before the determination of issues, and must in some rough mathematical or geometrical way lead to the determination of issues, not the other way around.

The concept of sufficiency of findings in a Due Process administrative forum is not new to this Court. This Court held in Securites and Exchange Commission v. Chenery, 318 US 80, 94-95, 63 S.Ct. 454 (1943) held:

> "Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination--an exercise of judgment in an area which Congress has entrusted to the agency--of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly function of the process of review requires that the grounds upon which the administrative agency acted by clearly disclosed and adequately sustained. 'The administrative process will best be vindicated by clarity in its exercise.' Phelps Dodge Corp. v. National Labor

Relations Board, 313 U.S. 177, 197 61 S.Ct. 845, 853, 85 L.Ed. 1271, 133 A.L.R. 1217. What was said in that case is equally applicable here: 'We do not intend to enter the province the (sic) belongs to the Board, nor will we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.' Ibid. Compare United States v. Carolina Carriers Corp, 315 U.S. 475, 488, 490 S.Ct. 722, 729, 730, 86 L.Ed. 971. In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of woods. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

CONCLUSION

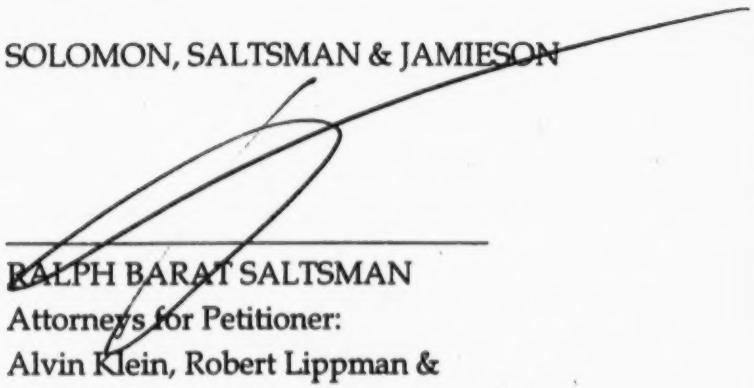
This court is respectfully requested to finally arbitrate the consitutional parameters of the administrative process below. The Appeals Board was correct in its determination of the insufficiency of the Findings of Fact. When the Court of Appeal failed to recognize the Board's statutory obligation to determine sufficiency of findings, the Court erred.

Additionally, those issues concerning the United States constitutional infirmities of the process which were never addressed by the administrative process due to a misapplication of California Constitution Article 3 § 3.5 left this Petitioner without Due Process.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SOLOMON, SALTSMAN & JAMIESON



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